No. 18-2486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re DONALD J. TRUMP, in his official capacity as President of the United States,

Petitioner.

On Petition for a Writ of Mandamus
to the United States District Court for the District of Maryland

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statute:

Legislative Material:

Other Authorities:

ARGUMENT

Plaintiffs barely defend the validity of their novel suit against the President of the United States seeking implied equitable relief for alleged violations of the Emoluments Clauses. Instead, plaintiffs primarily insist that, even if the suit is indisputably defective, this Court remains powerless to intervene until after final judgment is entered against the President and they have conducted intrusive discovery into his personal financial affairs and the official actions of his Administration. Plaintiffs fundamentally err, substantively and procedurally. Their extraordinary suit is non-justiciable and meritless, and this Court's mandamus authority gives it multiple options to intervene now to end this improper litigation.

I. PLAINTIFFS' SUIT IS NOT JUSTICIABLE

Plaintiffs' response brief (Br.) fails to rehabilitate the four independent threshold defects in their suit. First, plaintiffs lack an implied equitable cause of action to enforce the Emoluments Clauses. Second, plaintiffs' requested relief of an injunction against the President in his official capacity is barred by the separation of powers. Third, plaintiffs' alleged injuries are not cognizable interests protected by the Emoluments Clauses. And fourth, plaintiffs' alleged injuries cannot otherwise support Article III standing.[1]

[1] Although this Court would need to determine whether Article III standing exists before it could decide whether a cause of action is available, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998), it need not resolve Article III

A. In response to our petition's showing (at 17-18) that neither the Constitution nor Congress has provided any cause of action to enforce the Emoluments Clauses, plaintiffs contend (Br. 21) that courts have established a "general rule providing for equitable causes of action" to enforce federal law. No such "general rule" exists.

As the Supreme Court has recognized, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity," and as such is available only in "some circumstances" that present "a proper case." *See Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (federal equity jurisdiction is limited to historical practices of the English Court of Chancery). More recently, the Court has emphasized that judicially inferring a cause of action is a "significant step under separation-of-powers principles" because it intrudes upon "Congress, [which] has a substantial responsibility to determine" whether suit should lie against individual officers and employees. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017); *see also id.* (suggesting such concerns apply with lesser force to "*traditional* equitable powers" than to "a damages remedy" (emphasis added)).

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standing to hold that the suit must be dismissed because plaintiffs are not within any "zone of interests" protected by the Emoluments Clauses, *see id.* at 97 & n.2, or because the President is not amenable to suit in these circumstances, *see Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005).

The "classical[]" type of implied equitable suit, which "permit[s] potential defendants in legal actions to raise in equity a defense available at law," does not raise such separation-of-powers concerns. *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 906 (6th Cir. 2014); *see, e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). Such suits merely shift the timing and posture of litigating a legal question that Congress has already authorized to be adjudicated in federal court.

Here, by contrast, plaintiffs seek to create an equitable cause of action even though they "are not subject to or threatened with any enforcement proceeding" and thus this dispute otherwise would not be in federal court *at all*. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 620 (2012) (Roberts, C.J., dissenting). Plaintiffs' attempt to wield the Constitution "as a cause-of-action-creating *sword*" poses much greater separation-of-powers concerns. *See Michigan Corr. Org.*, 774 F.3d at 906. Plaintiffs observe (Br. 20-22) that such suits have sometimes been adjudicated, but they cite traditional equitable cases where a plaintiff's personal property or liberty interests are directly infringed by the government's challenged conduct. They cite no case holding that it is an appropriate use of traditional equitable jurisdiction to enjoin a federal officer's acceptance of property from a third party on the ground that the plaintiff allegedly would suffer indirect harm as a result. Indeed, most of plaintiffs' cases did not squarely address the propriety of judicially created causes of action, and

none of them did so after the Supreme Court in *Abbasi* emphasized the separation-of-powers concerns with such actions.

This case in particular presents controversial judgments about the proper scope of any cause of action to enforce the Emoluments Clauses—as discussed below, whether the President is amenable to suit and whether these specific plaintiffs allege cognizable interests. *See Armstrong*, 135 S. Ct. at 1385 (recognizing "implied … limitations" on equitable remedies, such as the "complexity associated" with judicial enforcement). Accordingly, the correct answer to the question "'who should decide[,]' … Congress or the courts," is, as it "most often will be[,] Congress." *See Abbasi*, 137 S. Ct. at 1857.

B. In response to the petition's invocation (at 18) of the separation-of-powers principle that "court[s] ha[ve] no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867), plaintiffs try to narrow *Mississippi* in two ways. Each argument misconstrues that precedent.

First, plaintiffs contend (Br. 22-23) that *Mississippi* must yield whenever there is no subordinate official to enjoin in the President's stead. This argument mistakes a constitutional doctrine for a rule of convenience. Just as "the separation of powers and the unique constitutional position of the President" preclude courts from inferring that the President is subject to the APA in the absence of a clear statement from Congress, so too those principles foreclose courts from inferring "jurisdiction

[over] a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 800-03 (1992) (plurality op.); *see id.* at 826 (Scalia, J., concurring in the judgment) (given the "separation of powers," it is "clear that no court has the authority to direct the President to take an official act"). Indeed, Justice Scalia's concurrence in *Franklin* explicitly concluded that the "constitutional claims [there] should be dismissed" because the asserted injuries could not be redressed without injunctive relief against the President. *See id.* at 829.[2]

Second, plaintiffs contend (Br. 24) that *Mississippi* does not extend to "ministerial" actions and that compliance with the Emoluments Clauses qualifies as such because it is "not discretionary." Although *Mississippi* left open whether the President may be required "to perform a purely ministerial act," plaintiffs here are "confounding … the term[] ministerial." 71 U.S. at 498. As the Court explained, "[a] ministerial duty" is "a simple, definite duty" in "which nothing is left to discretion." *Id.* Here, ensuring compliance with the Emoluments Clauses requires ample "exercise of judgment." *Id.* at 499. It is immaterial that violating the Clauses would be prohibited, because President Johnson in *Mississippi* likewise was prohibited from enforcing the statutes at issue if they were unconstitutional. *Id.* at 498. As President Trump must exercise judgment in determining whether his financial interests are

[2] By contrast, none of the Supreme Court cases plaintiffs cite are apposite, because they instead involve circumstances where the President's official actions were reviewed in suits against his subordinates; the President was sued in his individual capacity; or the President's amenability to suit was not expressly addressed.

compatible with his office under the Emoluments Clauses, his "performance of [that] official dut[y]" is not ministerial under *Mississippi*. *Id.* at 501.

C. In response to the petition's demonstration (at 18-20) that plaintiffs' alleged injuries are not cognizable protected interests under the Emoluments Clauses, plaintiffs make a scattershot of arguments. They all fail.

Most broadly, plaintiffs suggest (Br. 25 & n.9) that no "zone of interests" requirement applies to constitutional claims in light of *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). But while *Lexmark* clarified that the requirement is properly characterized as addressing the scope of a "cause of action" rather than "prudential standing," *Lexmark* also reaffirmed that this limitation on causes of action is a "requirement of general application." *Id.* at 127, 129. The Court there focused on "statutorily created causes of action," but it did so to emphasize the importance of congressional intent, *see id.* at 129, not to suggest, perversely, that courts should have broader authority to infer an equitable cause of action than to construe causes of action expressly created by Congress, *see infra* pp 7-8. The Court did not purport to overrule its precedent holding that plaintiffs must fall within "the zone of interests to be protected … by the statute *or constitutional guarantee* in question." *E.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982) (emphasis added).

Plaintiffs relatedly contend (Br. 26) that the protected-interest requirement is satisfied whenever a party is "injured by structural constitutional violations." But the

Supreme Court has emphasized that "[a]n individual who challenges federal action on these grounds" is subject to the rules "applicable to all litigants and claims." *Bond v. United States*, 564 U.S. 211, 225 (2011). Accordingly, the Court has applied the zone-of-interests requirement to plaintiffs asserting claims under the Dormant Commerce Clause. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977). Although persons directly regulated by federal officers exceeding their enumerated powers typically will satisfy the requirement, "absurd consequences would follow" if "any person injured in the Article III sense by a [structural constitutional] violation could sue" without regard to "the 'zone of interests' limitation." *See Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011).

Plaintiffs also dispute (Br. 25 n.10) that the zone-of-interests standard applies more strictly in non-APA constitutional cases, asserting that *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), only suggested that it might. But immediately after identifying the distinction between APA statutory claims and non-APA constitutional claims, *Clarke* stated that "[t]he difference made by the APA can be readily seen by comparing the 'zone of interest' decisions … with cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable": the latter cases "requir[e] more" in that the putative plaintiff must be "one of the class for whose *especial* benefit the statute was enacted," rather than just "a secondary concern." 479 U.S. at 400 n.16. *Clarke* clearly indicated that the same standard should apply for implied private rights of action under the Constitution, and *Abassi* underscored the

connection by relying on the implied statutory right-of-action cases in narrowing the scope of implied constitutional rights-of-action, *see* 137 S. Ct. at 1855-56.

In any event, plaintiffs cannot show that their asserted injuries satisfy any standard for identifying cognizable protected interests. As they acknowledge (Br. 4, 27), the Emoluments Clauses aim to protect against *the corrupting influence on official action* through the acceptance of Emoluments from foreign or domestic governments—and to do so as a prophylactic protection for the benefit of the public. The Clauses are not general anti-enrichment provisions, as evidenced by their limitation to foreign and domestic governments, which pose particular corruption concerns. Plaintiffs thus minimize their argument (Br. 28) that the Clauses were intended also to protect businesses seeking to compete with federal officials' business interests in a market for governmental customers—*i.e.*, the interest underlying plaintiffs' alleged proprietary and *parens patriae* injuries (Br. 44-50).

Plaintiffs instead emphasize (Br. 28, 41-44) that they feel "pressure" to provide alleged Emoluments to the President out of fear that they will otherwise "risk disadvantage or reprisal" when his Administration takes official actions concerning them. But that so-called "quasi-sovereign" injury fares no better. Plaintiffs identify no historical evidence that such an indirect interest is protected by the Clauses. Moreover, plaintiffs have not plausibly alleged any instance where the President has penalized or threatened to penalize them for failing to provide alleged Emoluments. *See* Add. 171-174. Nor have they even plausibly alleged any instance where another

government has provided alleged Emoluments at a time when it was competing with plaintiffs for a federal benefit, let alone that such a government ultimately received the benefit. *See id.* Accordingly, plaintiffs' fear of retaliation is utterly "speculative," and any actions they take in response are "self-inflicted." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 418 (2013); *infra* pp. 11-15 (demonstrating that such speculative injuries are inadequate under cases concerning competitor standing). Although plaintiffs respond (Br. 42-43) that they need not show any actual retaliation because it is the mere "*opportunity* for favoritism" that allegedly injures them, this argument mistakes an alleged violation of the law for a "concrete and particularized" injury. *See Spokeo v. Robbins*, 136 S. Ct. 1540, 1548 (2016).

Finally, plaintiffs object (Br. 29) that "it is hard to imagine who would fall within the Clauses' zone of interest" if they do not. But this is wrong in both premise and conclusion. Even assuming arguendo that someone must have a cognizable interest protected under the Clauses, it would be a plaintiff who, unlike plaintiffs here, could satisfy the difficult burden of plausibly alleging a threat of adverse official action due to an official's acceptance of prohibited Emoluments. More fundamentally, the "assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing," *Valley Forge*, 454 U.S. at 489, and the same goes for the requirement that plaintiffs must have a cognizable interest protected by the Clauses, *United States v. Richardson*, 418 U.S. 166, 179 (1974) ("the absence of" a proper "individual or class to litigate" supports the conclusion "the subject matter is

committed to … the political process"). Indeed, as explained above, the Clauses are prophylactic provisions for the benefit of the public generally and do not create cognizable interests in particular persons (absent a particularized cause of action created by Congress). *See id.* at 176-79.

D. Beyond that categorical failure, plaintiffs also fail to establish Article III standing for more specific reasons. Their asserted "quasi-sovereign" injuries (Br. 41-44) are, as discussed, speculative. *Supra* pp. 8-9. Likewise, their asserted "*parens patriae*" injuries of competitive harm to their citizens (Br. 44-46) and "[p]roprietary" injuries of competitive harm to their own commercial endeavors (Br. 46-50) are inadequate.

1. The Supreme Court has long held that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). "This prohibition rests on the recognition that a state possesses no legitimate interest in protecting its citizens from the government of the United States." *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011). That is "no part of [a State's] duty or power," because a State's citizens are also United States citizens, and "it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923).

Plaintiffs cannot avoid this result by arguing (Br. 44) that they "challenge conduct by the President outside of his 'official duties.'" This is an *official-capacity* suit,

and the alleged Emoluments are prohibited *only because* the President holds federal office. Plaintiffs' argument thus reduces to the point (Br. 44-45) that they contend a federal officer is exceeding his constitutional authority—but that was true in *Mellon* itself, 262 U.S. at 485-86.

Plaintiffs' reliance (Br. 44) on *Massachusetts v. EPA*, 549 U.S. 497 (2007), is misplaced. In holding that Massachusetts had standing to challenge an EPA decision, the Supreme Court did not rely on Massachusetts's *parens patriae* interests in protecting its citizens; rather, it relied on the Commonwealth's own "particularized injury in its capacity as a landowner" seeking "to preserve its sovereign territory," *id.* at 519, 522, and also on a procedural right and cause of action created by Congress, *id.* at 520. Likewise, contrary to plaintiffs' suggestion (Br. 38), they have not asserted the type of sovereign injury that warrants "special solicitude" under *Massachusetts*, 549 U.S. at 520. The unique circumstances there are not present here, where plaintiffs merely allege indirect financial harms and lack a statutory cause of action. Applying special solicitude in these circumstances would be particularly inappropriate because the Supreme Court's "standing inquiry has been especially rigorous" when the case requires "decid[ing] whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

2. Regardless, plaintiffs fail to demonstrate any commercial injuries from the alleged Emoluments Clauses violations, let alone injuries to themselves (rather than

their citizens). Plaintiffs are unable to identify *any* instance where they or even their citizens have lost or will lose a governmental customer to businesses in which the President has a financial interest *and* the loss is fairly traceable to that interest. *See* Add. 24 (noting only two situations where foreign governments may have switched from *non-party* hotels for *unidentified* reasons). Lacking such evidence, plaintiffs invoke cases (Br. 46-47) sometimes allowing a plaintiff to "challeng[e] unlawful conduct that undermines his ability to participate in a competitive market on equal terms." Plaintiffs' reliance on these competitor-standing cases is unavailing in this wholly different context.

Courts have recognized competitor standing where the government's unlawful action has afforded a benefit to a competitor that permits a *presumption* that the plaintiff will *inevitably* be injured. *See Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010) ("the basic requirement common to all [such] cases" is that the competitive benefit must "almost certainly cause an injury in fact"); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008) ("the doctrine of 'competitor standing[]' … relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact"). But that presumption does not apply where there is no basis in economic logic to deem injury inevitable. *See, e.g., El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 28 (D.C. Cir. 1995) (choice of regulators was not an "injury in fact" for "'competitor standing' cases" absent evidence of "a difference in regulatory burdens"); *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (alleged reputational benefit to

competitor from enhanced regulatory burdens was "simply too attenuated and speculative"); *New World Radio, Inc. v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (similar). The Supreme Court has rejected "a boundless theory of standing" in which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). Competitor-standing cases do not allow standing theories resting on a "speculative chain of possibilities." *See Clapper*, 568 U.S. at 410-14. Rigorous scrutiny of the causal chain in this case is especially warranted due to the serious separation-of-powers concerns.

Here, given the unusual nature of the alleged competition, no presumption of injury is warranted—indeed, even if this were a mere commercial dispute. According to plaintiffs, the President's financial interests in the Trump International Hotel and BLT Prime will, as a matter of economic logic, inevitably injure plaintiffs' commercial interests in the Washington Convention Center or the Bethesda Marriott Conference Center. That conclusion rests on three levels of speculation that, collectively, foreclose plaintiffs' conclusion.

First, plaintiffs speculate that government customers patronize the President's businesses *because of his financial interests*, rather than the businesses' other qualities. But as plaintiffs' own expert recognizes, "[i]mportant attributes in choosing a hotel include location, facilities, services, amenities, class and image, and price." Dkt. 47 (Roginsky

Decl.), ¶ 17; *see CREW v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017). Moreover, plaintiffs ignore that the government customers they hypothesize will try to curry favor with the President might continue to do so by supporting his family's business and brand even if he lacked a personal financial interest—indeed, plaintiffs' own amici emphasize that foreign governments will "seek every advantage" to influence our government. Former Nat'l Sec. Officials Amicus Br. 20-21.

Second, plaintiffs speculate that government customers who patronize the President's businesses only because of his financial interest would otherwise patronize *plaintiffs'* businesses, not any of the countless other hotels, restaurants, and convention spaces in the area. *See* Dkt. 48 (Muller Decl.), ¶¶ 24-26 (identifying alleged competitors). *Third*, plaintiffs ignore the potentially countervailing effects of the President's financial interests in the businesses: some government officials may be inclined to avoid those businesses, including to make a political statement or avoid even an unjustified appearance of impropriety. *See United Transp. Union v. ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989) (rejecting standing where "it is wholly speculative whether [challenged conduct] will harm rather than help" plaintiffs).

It is thus unsurprising that plaintiffs have not alleged an imminent, non-speculative loss of government business because of the President's financial interests. While plaintiffs' experts opined that the President's properties compete with the Washington Convention Center (though not the Bethesda Marriott Conference Center) and with various regional restaurants, those experts did *not* opine that

plaintiffs' properties are *in fact* likely to lose business to the President's properties because of his financial interests. *See* Dkt. 47 (Roginsky Decl.), ¶¶ 23-27; Dkt. 48 (Muller Decl.), ¶¶ 23-26. In sum, this case is not a concrete commercial dispute, but rather the type of abstract legal debate that Article III precludes federal courts from adjudicating. *See Valley Forge*, 454 U.S. at 482-83, 489.

II. PLAINTIFFS' SUIT FAILS ON THE MERITS

As the petition explained (at 21-23), the Constitution's text and historical practice demonstrate that a prohibited Emolument is limited to compensation accepted from a foreign or domestic government for services rendered by an officer in either an official capacity or an employment-type relationship. The Clauses do not prohibit an officer from merely receiving profits from a business engaged in commercial transactions with government customers. Plaintiffs' brief here does not meaningfully engage with that showing (Br. 29-32), but plaintiffs respond at greater length in their brief in the President's individual-capacity appeal (IC Br.). Their efforts fail at every level.

A. Plaintiffs acknowledge (IC Br. 26-28) that, at the Founding, dictionaries defined "Emolument" in two ways. Some defined the term to mean "benefit," "advantage," or "profit" generally, *A New General English Dictionary* (18th ed. 1754), while others gave the office-specific definition "profit *arising from an office or employ*," *Barclay's A Complete and Universal English Dictionary on a New Plan* (1774) (emphasis added), https://books.google.com/books?id=IwZgAAAAcAAJ. *See* James Cleith

Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution*, 59 S. Tex. L. Rev. 181, 190-91 (2017) (cautioning against simplistic reliance on Founding-era dictionaries). Similarly, scholars dispute which sense of the word "Emolument" was used most often in the Founding era and by the Framers themselves. *Compare id.* at 224-25, *with* Cunningham & Egbert Amicus Br. 28. Where a term in the Constitution is "of doubtful meaning, taken by itself," the "doubt may be removed by reference to associated words." *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Here, considering the word "Emolument" within the Clauses in which it appears reveals that the only natural way to read it is to adopt the narrower, office-or-employment reading.

First, given that the Foreign Emoluments Clause prohibits the acceptance of a "present," in addition to an "Emolument," U.S. Const. art. I, § 9, cl. 8, the broader "profit" or "gain" definition of "Emolument" would improperly render the word "present" superfluous. *See Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) ("In expounding the Constitution … no word was unnecessarily used."). At the Founding, as now, a "present" was defined as "a gift, or something given which a person could not claim." *Barclay's A Complete and Universal English Dictionary on a New Plan*. Because a "present" clearly conferred upon its recipient a "profit" or "gain," it would have been gratuitous to list "present" separately if "Emolument" had the broader meaning. By contrast, including "present" would have been warranted if "Emolument" narrowly meant "profit from office or employ." Plaintiffs appear to suggest (IC Br.

30 n.14) that "present" was instead included to clarify that the term "Emolument" covered "profits" and "benefits" that were "unreciprocated" or not "monetary," but plaintiffs fail to explain why that clarification would have been needed under their broad understanding of "Emolument."

Second, the narrower definition of "Emolument" is further confirmed by comparing the Foreign Emoluments Clause's remaining terms. The Clause prohibits a person holding any "Office of Profit of Trust under [the United States]" from accepting from foreign governments "any present, Emolument, Office, or Title, of any kind whatever." U.S. Const. art. I, § 9, cl. 8. The three items in the list besides "Emolument" are all things that the foreign government confers or bestows on the person in his capacity as a federal officer or a type of foreign employee or honoree. This strongly supports construing "Emolument" likewise to have the narrower, "profit from office or employ" definition. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Plaintiffs argue otherwise (IC Br. 29) based on the Clause's "double use of the expansive modifier 'any,'" but that emphatic language simply underscores that the Clause reaches *all "Emoluments"* without exception—it does not resolve what constitutes an "Emolument." *See Small v. United States*, 544 U.S. 385, 388 (2005); *Virginia*, 148 U.S. at 518-19.

Third, the Domestic Emoluments Clause's terms likewise confirm the narrower "profit from office or employ" definition. As relevant here, the Clause provides that, while the President "shall … receive for his Services, a Compensation," he "shall not receive … any other Emolument from the United States, or any of them," during his Presidency. U.S. Const. art. II, § 1, cl. 7. The Clause thus prohibits the President from accepting, in addition to his prescribed "Compensation," any "other Emolument" "for his Services," directly equating "Emolument" with payment for services provided by the President. Plaintiffs ignore (IC Br. 30) these textual indicia.

Finally, the only other instance in which "Emolument" is used in the Constitution again ties it to payments for an office. The Incompatibility Clause prohibits a Senator or Representative from assuming "any civil Office … which shall have been created, or the Emoluments whereof shall have been encreased," during his or her tenure. U.S. Const. art. I, § 6, cl. 2. The Clause thus treats an "Emolument" as an aspect of an "Office" that may be "encreased" by Congress, expressly linking it to the official's employment and duties. That alone is powerful evidence, as scholars and jurists dating back to Chief Justice Marshall and Justice Story have noted that the Framers intended the same words to have the same meaning throughout the Constitution. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 758-63 (1999). Plaintiffs' rejoinder (IC Br. 31), that the word "whereof" would have been unnecessary if "Emolument" alone were "always to be read as a synonym for salary or

payment," defies basic grammar: the Incompatibility Clause's phrasing requires such a qualifier regardless, as is evident by substituting "salary" for "Emolument."

B. The "contemporaneous practice by the Founders themselves," which is "significant evidence" of constitutional meaning, confirms that the Emoluments Clauses do not reach ordinary commercial transactions with government customers. *See Mistretta v. United States*, 488 U.S. 361, 399 (1989). As the petition demonstrated (at 22-23), President Washington purchased public land from the federal government, and Presidents Washington and Jefferson owned plantations that exported goods overseas. Plaintiffs suggest (IC Br. 39) that the land Washington purchased was privately owned and thus did not constitute a gain provided the United States, but that is factually wrong. *See* Tillman IC Amicus Br. 8-10 (citing historical sources). Likewise, plaintiffs invoke (IC Br. 39-40) the absence of evidence that the early Presidents' trading partners included government customers, but that silence is itself revealing: the early Presidents were careful to avoid violating the Emoluments Clauses—as plaintiffs emphasize (*see* IC Br. 36)—and thus there presumably would have been evidence of the steps they took to ensure that they did not trade with government customers if they had thought it was necessary.

Indeed, this historical understanding is vividly illustrated by a proposed constitutional amendment in 1810 that would have extended the prohibitions of the Foreign Emoluments Clause to all private citizens on pain of loss of citizenship. S.J. Res. 2, 11th Cong., 2 Stat. 613 (1810). Under plaintiffs' view, this putative

amendment would have prevented all U.S. citizens from transacting any business with foreign governments—an implausible construction that could not have been shared by the Founding generation. The district court gave this point essentially no weight because the amendment "never became law" and "underwent virtually no debate," Add. 79, but that dismissive treatment ignores that the proposed amendment had overwhelming support in Congress and was only two States short of ratification. *See* Dkt. 21 (Mot. to Dismiss), at 45.

Modern presidential practice further repudiates plaintiffs' position. Plaintiffs do not attempt to reconcile their view of the Emoluments Clauses with how President Obama (and likely other Presidents) could receive payments from U.S. Treasury Bonds and various other securities. Moreover, although plaintiffs at least try (IC Br. 38) to defend President Obama's likely acceptance of royalties based on government purchases of his books, they fail to explain their suggestion that such royalties would not be Emoluments "from" the government purchaser simply because they flow through his publisher, given their view that President Trump's receipt of profits from his business does include Emoluments "from" the business's government customers. And importantly, plaintiffs have repudiated the district court's method for solving such problems—its textually indefensible "de minimis" exception, *see* Pet. 22—by acknowledging (Br. 6) that the Emoluments Clauses prohibit the acceptance of even "small" amounts from government entities and even without "direct personal contact or relationship." Accordingly, plaintiffs' position necessarily means that *no* federal

officer can own *any* stock in *any* business patronized by *any* foreign government customer. That plaintiffs' position entails such absurd results underscores that it cannot be correct.[3]

C. Finally, plaintiffs are also wrong that their complaint would state a claim even under the "profit arising from office or employ" definition of Emolument. Plaintiffs suggest (IC Br. 28) that the President's profits from his businesses "arise from employ" because "the historic meaning of 'employ' was 'a person's trade, [or] business.'" But plaintiffs once again construe terms in isolation rather than in context. Given that the Foreign Emoluments Clause prohibits acceptance of any "Emolument, *Office, or Title* … *from* [a foreign government]," U.S. Const. art. I, § 9, cl. 8 (emphases added), and that the Domestic Emoluments Clause prohibits acceptance of "any *other* Emolument" "*for [the President's] Services*" "*from* [a domestic government]," *id.* art. II, § 1, cl. 7 (emphases added), it is evident that those Clauses prohibit no more than the acceptance of additional compensation for an official's "employ" *by a foreign or domestic government*. And as historical practice confirms, that prohibition does not encompass profits from ordinary commercial transactions between a federal officer's private businesses and government customers.

[3] This also underscores why Plaintiffs err in invoking general "considerations of the Clauses' purpose." IC Br. 31. "[N]o law pursues its purpose at all costs, and … the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v. Holder*, 558 U.S. 233, 252 (2010).

Likewise, plaintiffs reprise (Br. 31-32) the district court's suggestion that any profits the President's businesses receive *simply because* he is the President "arise from office." But plaintiffs fail to refute the petition's contrary showing (at 26-27) that "profit arising from office" is payment an officer accepts for his official services rather than merely commercial profits he indirectly receives from government customers hoping to influence him. That is why President Obama did not violate the Emoluments Clauses regardless of why any government customers purchased his books and indirectly paid him royalties. In sum, under the interpretation of "Emolument" compelled by text and history, plaintiffs have failed to state a claim.

III. MANDAMUS RELIEF IS WARRANTED

Plaintiffs insist that this Court is powerless to act until after final judgment is entered and the President has been subjected to intrusive discovery into his personal financial affairs and the official actions of his Administration. But this Court can and should provide mandamus relief, and may do so in one of two ways: (1) directing the district court to certify its motion-to-dismiss orders under 28 U.S.C. § 1292(b); or (2) directing the district court to dismiss the complaint. Either way, the end result is that the case should be dismissed.

A. As the petition explained (at 10-11), this Court may issue a writ of mandamus directing the district court to certify an immediate appeal under § 1292(b), because a "clear and indisputable" right to mandamus may be demonstrated by identifying "exceptional circumstances amounting to a judicial usurpation of power *or*

a clear abuse of discretion," *see Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004) (cleaned up; emphasis added).

Cheney refutes plaintiffs' suggestion (Br. 14) that mandamus is categorically unavailable to review a district court's discretionary judgments. Likewise, although plaintiffs cite non-controlling authority (Br. 15-17) declining to provide mandamus review of a district court's refusal to grant certification under § 1292(b), plaintiffs' affirmative argument (Br. 17-18) in support of that position ignores the Supreme Court's instructions. Whereas plaintiffs contend that the denial of certification under § 1292(b) can never constitute clear error warranting mandamus, the Supreme Court has stressed that "[d]iscretion is not whim," and that a "motion to a court's discretion is a motion, not to its inclination, but to its judgment." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931-32 (2016). Where discretion can be abused, it can be clearly and indisputably abused, potentially warranting mandamus relief. That principle applies with particular force here because the district court's decision did not rest on any discretionary judgment. As the petition demonstrated (at 23-27), the court's denial of § 1292(b) certification was based on the court's *purely legal*, *indisputably erroneous* conclusion that the President's arguments for dismissal were insubstantial and would not end the case.

If plaintiffs were correct, an appellate court would be powerless to act even if a district court denied certification on unquestionably improper grounds: for example, express disagreement with controlling precedent requiring dismissal, or personal

curiosity about the facts in discovery. Nothing about § 1292(b) allows a district court to deny certification on such grounds or shields such a ruling from mandamus relief in the rare case where, as here, any reasonable jurist would have granted certification.

Plaintiffs' attempt (Br. 18-19) to distinguish *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982), gets things backwards. The fact that the Eleventh Circuit directed the district court to certify its jurisdictional order for review under § 1292(b) without even affording the district court the opportunity to deny certification underscores an appellate court's authority to compel certification in a truly extraordinary case. *See id.* at 431-32. Mandamus is at least as warranted here as it was in *Fernandez-Roque*, particularly in light of the heightened separation-of-powers concerns in this novel constitutional suit brought against a sitting President. *See Cheney*, 542 U.S. at 382, 390.

Finally, plaintiffs misunderstand (Br. 19, 29, 31) the application of the mandamus standard to the § 1292(b) denial, suggesting that the question is whether the President has shown a clear and indisputable right *to dismissal*. Instead, the question in this context is only whether the President has established a "clear abuse of discretion," *Cheney*, 542 U.S. at 380, in denying *certification for immediate appeal*. And that question reduces to whether it is clear that there exists, at the very least, "substantial ground for difference of opinion" concerning whether plaintiffs' suit against the President under the Emoluments Clauses must be dismissed as non-justiciable or meritless. 28 U.S.C. § 1292(b); *see* Pet. 11, 15-17.

B. Alternatively, as the petition explained (at 28), this Court may issue a writ of mandamus directing the district court to grant the motion to dismiss. For the reasons discussed, the President is clearly entitled to dismissal of this suit. And if so, then the question, as plaintiffs recognize (Br. 34), is whether appeal from a final judgment is an adequate remedy foreclosing mandamus where the suit is brought directly against the President and would entail intrusive discovery. The answer is plainly no.

Because the President is not properly subject to this suit *at all* given the separation-of-powers concerns (*supra* pp. 4-6), an appeal following final judgment is not adequate relief. As the petition explained (at 29-30), this Court applied the same principle in *In re Sewell*, 690 F.2d 403, 406-07 (4th Cir. 1982). Plaintiffs' attempt (Br. 37 n.16) to distinguish *Sewell* as involving a "jurisdictional conflict" with an administrative agency is doubly illusory: the Supreme Court has stated that "court[s] ha[ve] no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi*, 71 U.S. at 501, and *Sewell*'s reasoning that a post-judgment appeal is not an adequate means of relief where the suit does not belong in district court applies equally to suits barred by *Mississippi*'s rule (whether or not technically "jurisdictional").

Finally, plaintiffs erroneously suggest (Br. 36) that *Cheney*'s separation-of-powers concerns with discovery against the President are not implicated here because, "[t]o date, discovery has been sought only from third parties, many of which are

private businesses." In fact, plaintiffs seek intrusive discovery into the President's personal financial affairs and the official actions of his Administration—including through third-party subpoenas of government agencies, and potentially later against the President himself. Pet. 9-10. Just as *Cheney* presented the threat of discovery into the process by which senior government officials "give advice and make recommendations to the President," 542 U.S. at 385, plaintiffs' claims present the threat of discovery into whether the President's "policy decision[s]" were "influence[d]" by the alleged Emoluments, Br. 48; *see, e.g.*, Subpoena to GSA, Attach. A, Req. No. 12 (Dec. 4, 2018) ("For the period November 8, 2016 to the present, all Communications with the President or White House concerning the location of the headquarters of the Federal Bureau of Investigation."). Contrary to plaintiffs' suggestion (Br. 37) that the district court can manage discovery to minimize these concerns, the point is that *none* of this intrusive discovery should be allowed in this improper official-capacity suit against a sitting President.

CONCLUSION

The petition for a writ of mandamus should be granted, and plaintiffs' suit should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6484 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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